91-1779

No._____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FARES SHAMSE EDDINE,
Petitioner,

v.

AMAR BEETAR EDDINE,
Respondent.

Petition for a Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Sec. 8.01-319, Code of Virginia (1950, as amended), which was used by the trial court as justification for an order dispensing with all further notice to petitioner, is invalid because it is repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution, as applied?

2. Whether it is a violation of due process to dispense entirely with notice to a litigant of the setting of a trial date?

3. Whether the trial court erred in holding that it could not set aside its order of August 1, 1988, despite the fact that the hearing on that day was held without any notice to petitioner, and, therefore, violated his right to due process and was void?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FARES SHAMSE EDDINE,
Petitioner,

v.

AMAR BEETAR EDDINE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

Fares Shamse Eddine petitions this Court for a Writ of Certiorari to the Supreme Court of Virginia.

OPINIONS BELOW

The decision of the Supreme Court of Virginia refusing petitioner's petition for appeal (Appendix, infra, p. APP 15) was not reported. The opinion of the Court of Appeals of Virginia (Appendix, infra, pp. APP 1-13) is reported at 12 Va. App. 760, 406 S.E.2d 914 (1991).

JURISDICTION

The decision of the Supreme Court of Virginia refusing petitioner's petition for appeal was rendered on January 29, 1992. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Due Process Clause of the Fourteenth Amendment, United States Constitution, which provides: "Nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

2. Sec. 8.01-319, Code of Virginia (1950, as amended), which is set forth verbatim in the Appendix. (APP 26-27)

STATEMENT OF THE CASE

This case arises from an equitable distribution award made on August 1, 1988, by the Circuit Court of Fairfax County, in the divorce proceedings of Petitioner, Fares Shamse Eddine, and Respondent, Amar Beetar Eddine.

Petitioner was not present at the equitable distribution hearing, nor did he receive any notice, actual or constructive, of the date of the hearing, because Respondent, by counsel, had obtained an order from the trial court on May 6, 1988, (APP 18) which dispensed with all further notice to Petitioner, pursuant to the provisions of Va. Code 8.01-319, which allows a trial court to, inter alia, dispense with all further notice to a pro se litigant who has moved without leaving his or her new address with the court.

The factual predicate of the order dispensing with notice was Respondent's affidavit (APP 17) filed with the trial court stating that Petitioner had left the country and moved to Syria. The affidavit stated, in pertinent part:

> 1. The defendant has removed himself from Fairfax County and from the Commonwealth of

Virginia and no longer resides in this area.

2. Upon information and belief, the defendant has moved to Syria with no intention of returning.

On May 10, Respondent, by counsel, filed a praecipe (APP 19) requesting that the case be placed on the term day docket for May 31, 1988, noting that the defendant was not entitled to any notice in the matter. Accordingly, no attempt whatsoever was made to transmit to Petitioner any notice of term day. At term day, the trial was set for August 1, 1988, but, again, no notice of this was ever given to Petitioner. On August 1, 1988, the court awarded Respondent a lump sum equitable distribution award of $289,540, plus $3000 for attorney's fees. (APP 20-21)

Although Petitioner had no notice of the second equitable distribution hearing, he did learn of the second equitable distribution hearing shortly thereafter.

On August 18, 1988, Petitioner filed, pro se, a Notice and Motion (APP 22) that on the 22nd day of August, 1988, he would move the Court "to set aside the orders entered herein on August 1, 1988, on the grounds that they are void, having been entered without notice to me." This motion was not heard until August 26, 1988.

Shortly thereafter, Petitioner retained counsel, who filed a second motion to set aside the order of August 1, 1988, on the grounds that it was void because the Court had dispensed with notice to Petitioner, in violation of the requirements of due process. (APP 24)

A hearing on the matter was held on September 5, 1988.

Petitioner testified that he did go to Syria on March 29, 1988, and returned to the United States on June 24, 1988. He was living in the marital residence on August 1, 1988. Respondent admitted that she had seen Petitioner on the street a few houses from the marital residence a few days before the hearing, but she did not tell the Court that Petitioner had returned from Syria because she "was not asked."

On September 5, 1988, the Circuit Court of Fairfax entered an order denying Petitioner's Motion to set aside the

judgment of August 1, 1988 as void and violative of the petitioner's due process rights under the Constitutions of the United States of America. (APP 23)

On January 6, 1989, the Circuit Court of Fairfax County entered an order denying Petitioner's Motion to Reconsider on the grounds that more than 21 days had elapsed since the entry of the order. (APP 25)

Petitioner filed an appeal of the denial of both motions to the Court of Appeals in separate cases which were consolidated by the Court. In Case No. 1558-89-4, Petitioner raised the following questions:

> 1. Whether it is a violation of due process to dispense entirely with notice to a litigant of the setting of a trial date?
>
> 2. Whether it is a violation of due process to give pro se litigants less notice than that given litigants represented by counsel?

In Case No. 0158-89-4, Petitioner raised the following question:

> Does Rule 1:1 of the Rules of the Supreme Court of Virginia bar a motion to set aside a judgment as void if the motion is argued more than 21 days after the entry of the judgment sought to be set aside?

On July 1, 1991, the Court of Appeals (Cole, J., dissenting) affirmed the judgment of the trial court, holding that Petitioner was not denied due process, nor was the trial court in error in concluding that it could not set aside the judgment more than twenty-one days from its entry because the judgment was not void. (APP 1-13)

Petitioner filed a request for rehearing en banc, which was denied on August 22, 1991. (APP 14)

Petitioner then filed a petition for appeal to the Supreme Court of Virginia, which raised the following constitu

tional questions as Assignments of Error:

> I. THE COURT OF APPEALS ERRED WHEN IT HELD THAT IT IS NOT A DENIAL OF PROCEDURAL DUE PROCESS TO DISPENSE WITH ALL NOTICE TO A PRO SE LITIGANT.
>
> II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE JUDGMENT ENTERED ON AUGUST 1, 1988, AFTER A HEARING WITH NO NOTICE TO PETITIONER, SHOULD NOT HAVE BEEN SET ASIDE BECAUSE MORE THAN 21 DAYS HAD ELAPSED FROM THE ENTRY OF THE ORDER.

That petition raised the following Questions Presented:

> 1. Whether it is a denial of procedural due process for a trial court to dispense with all notice to a pro se litigant who has moved and not filed a written statement of his intended future place of residence with the court, as provided in Va. Code 8.01-319?
>
> 2. Whether the trial court erred in holding that it could not set aside its order of August 1, 1988, despite the fact that the hearing on that day was held without any notice to Appellant, and, therefore, violated his right to due process and was void?

This petition was denied on January 29, 1992. (APP 15)

REASONS FOR GRANTING THE PETITION

The primary issue before the Court is whether it is an unconstitutional denial of due process for a trial court to dispense with all future notice to pro se litigants who have not complied with the requirements of Va. Code 8.01-319. This statute requires pro se litigants to file a written statement of changes of residence and mailing address during the pendency of an action with the clerk of court in which the matter is pending. Petitioner submits that Va. Code 8.01-319, as applied, is repugnant to the Due Process Clause of the fourteenth amendment of the United States Constitution.

Va. Code 8.01-319A purports to give the court the authority to dispense with interim notice to certain pro se litigants who fail to file a written statement of place of residence and mailing address, and inform the clerk in writing of any changes in residence and mailing address during the pendency of the action. Va. Code 8.01-319B, in relevant part, purports to give the court the authority to dispense with notice by order of publication to a litigant who has moved from the county in which the suit is pending, if a resident thereof, without having filed a written statement of his or her change of residence with the clerk of the court where the suit is pending. The record does not indicate whether the trial court relied on 8.01-319 (A) or (B), but reliance on either one as justification for an order dispensing with all further notice clearly violates the Due Process Clause of the fourteenth amendment.

The fourteenth amendment requires no one shall be deprived of life, liberty, or property by state action without due process of law. In the context of litigation, this Court has held that "at a minimum," due process requires that "deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank, 339 U.S. 306, 313; 70 S. Ct. 652, 656-57 (1950). It is fundamental to due process that notice be given which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." 339 U.S. at 314; 70 S.Ct. at 657. Such notice "must

be of such nature as reasonable to convey the required information" and it must "afford a reasonable time for those interested to make their appearance." Id. See also Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956); Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed. 2d. 75 (1988).

Due process requires that all branches of the government, including the judiciary, must provide notice to individuals of government actions which would deprive those individuals of a constitutionally protected interest. The form of the notice and the procedure for delivery or posting of the notice must be reasonably designed to insure that the interested parties in fact will learn of the proposed adjudicatory action.

Prior to Mullane and its progeny, the common-law rule, broadly stated, was that after a litigant had been served with process, it was the duty of the litigant to keep himself apprised of the time the case was set for trial. Subsequent to Mullane, it has clearly become the general rule that some form of notice that a case has been set for trial is an essential element of procedural due process. 75 Am. Jur. 2d Trial sec. 66, "Necessity of Notice," p. 280, n. 80 and accompanying text (1991).

The decision of the Court of Appeals affirming the trial court in the instant case (and, by extension, the Virginia Supreme Court in denying the petition for appeal) is in conflict with the decisions of numerous state supreme courts and state intermediate appellate courts, which have held that due process requires that litigants be given notice of every critical stage of litigation, including notice of trial, so that they have an opportunity to meet and defend the issues at a meaningful time and in a meaningful manner. Put simply, after Mullane and its progeny, it has become a recognized fundamental element of due process that one who seeks to alter another's legal rights must give notice to the latter before a court can act upon the claim, which includes notice of motions, hearings, and trials.

Space does not allow a full statement of the facts and holdings of all cases which Petitioner has found to support his argument; one representative decision on point was rendered by the Supreme Court of Tennessee in the case of Bryant v.

Edwards, 707 S.W.2d 868 (Tenn. 1985). In that case, the Court held "it is axiomatic that all parties to litigation are entitled to receive notice of important hearings and other proceedings; due process requires it." 707 S.W.2d at 870.

In Cravans, Dargen & Co v. Superior Court, 737 P.2d 1373 (Ariz. 1987), the Arizona Supreme Court held that it was a denial of due process to render a judgment against one defendant at a hearing of which that defendant had no notice, and counsel for defendant had not attended because it was not supposed to involve his client. The Court observed that it was "a rule as old as law" that no one shall be personally bound by judgment until he has had his day in court, by which, the Court stated, is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. "Judgment without such citation and opportunity lacks all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is fairly administered[.]" 737 P.2d at 1375.

Accord, Division of Employment Security v. Smith, 615 S.W.2d 66 (Mo. 1981) en banc; Nelson v. Jacobsen, 669 P.2d 1207, 1211-1213 (Utah 1983); Rogers v. Texas Commerce Bank - Reagan, 755 S.W.2d 83 (Tex. 1988); Lawrence-Allison & Associates West, Inc. v. Archer, 767 P.2d 989, 997 (Wyo. 1989) ("It is basic that, before a property interest can be terminated, except in emergency situations, due process must be afforded to litigants in the form of notice and a meaningful opportunity to be heard."); Chicago v. American National Bank & Trust Co., 525 N.E. 2d 917, 920 (Ill. App. 1 Dist. 1988) ("It is of ancient precedent in this country that '[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'") (Citing Baldwin v. Hale, 68 U.S. (1 Wall.) 223. 233 (1863); Moore v.Terre Haute First National Bank, 582 N.E.2d 474, 478 (Ind. App. 1st Dist. 1991); Eastin v. Franklin, 806 S.W.2d 57, 62-63 (Mo. App.) 1991, reh. den. (1991) ("Constitutional due process requires that for a judgment entered against a party not in default to be valid, there must have been notice of the trial setting and an opportunity to be heard must have been granted at a meaningful time and in a meaningful manner."); Hayes v.

Panola-Harrison Electric Cooperative, Inc., 564 So. 2d 738, 739 (La. App. 2d Cir. 1990) ("Adequate notice of trial is one of the most fundamental requirements of procedural due process."); Langdale v. Villamil, 813 S.W.2d 187, 191 (Tex.App. - Houston [14th Dist.] 1991).

Numerous other state appellate courts and state supreme courts have held that a litigant is entitled to notice of trial setting without expressly citing the Constitutional guarantee of due process, in some instances because notice of trial is a rule of state civil procedure, while in other cases neither a rule nor the Constitution is cited, see, e.g., Carroll v. Carroll, 228 S.E.2d 832 (Ga. 1976) (state rule); Combs v. Griffith, 429 S.W. 2d 849 (Ky. 1968) (state rule); Roach v. Roach, 418 A. 2d 742 (Pa. 1979) (state rule); Wheeler v. Irwin, 145 S.E. 2d 121 (W. Va. 1965) (state rule); Dollar v. Tapp, 404 S.E. 2d 482 (N.C. App. 1991) (state rule); Bogan v. Kreski, 546 So. 2d. 1132 (Fla. App. 1st Dist. 1989) state rule); Winnick v. Winnick, 216 A. 2d 185 (Conn. 1965) (No rule cited, "fundamental in proper judicial administration"); Indian Head Millwork Co. v. Glendale Homes, 185 A. 2d 259 (N.H. 1962) (No rule cited); Smith v. Smith, 235 A. 2d 127 (Pa. 1967) (No rule cited); Sijon v. Green, 345 S.E. 2d 246 (S.C. 1986) (No rule cited.)

Petitioner recognizes that the state has an interest in the orderly control of court dockets, and that there is a balance to be struck between the litigant's constitutional right to notice and the court's need to control its docket. Petitioner submits that Va. Code 8.01-319, as applied by the trial court, strikes the balance too far in favor of the interests of judicial efficiency, thereby violating principles long established by the United States Supreme Court. Due process requires some form of notice. If the whereabouts of the litigant can be determined with reasonable effort, then he or she is entitled to actual notice. If the litigant cannot be found, then he or she is entitled to constructive notice.

In Mullane, supra, the United States Supreme Court held that notice by newspaper publication of judicial action to settle accounts of a trust fund was constitutionally sufficient to comport with due process when the whereabouts of the

beneficiaries could not be ascertained with reasonable effort, but also held that when the beneficiaries' whereabouts were known or reasonably ascertainable, constructive notice was not sufficient for due process. 339 U.S. at 314. See also, Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) (notice of a tax sale by mail or other equally effective means is the minimum constitutional requirement); Tulsa Professional Services v. Pope, 485 U.S. 478, 103 S.Ct. 1340, 99 L.Ed. 565 (1988), on remand, In re Estate of Pope, 808 P.2d 640 (Okl. 1990), reh. den. (1991).

In re Estate of Pope, supra, is a recent case directly on point. On remand from the United States Supreme Court, the Supreme Court of Oklahoma noted that while, prior to Mullane, and, indeed, for some thirty years after Mullane, Oklahoma courts required litigants to protect their interests by monitoring court dockets during critical stages, the Supreme Court of Oklahoma had previously expressly condemned this notion of due process in the context of general civil litigation in 1981, in the case of McCullough v. Safeway, 626 P.2d 1332 (Okl. 1981). The concept announced in McCullough was embodied subsequently in an Oklahoma rule of Court. Pope, supra, 808 P.2d at 644, n. 21.

In the case at bar, the trial court dispensed with *all* notice to Petitioner. Despite the fact that he was living in the marital domicile, where he had lived for years, he was not given notice, not actual notice, nor constructive notice that the trial was set. There was no attempt to notify him by delivery, by posting, by telephone, or by mail, registered or otherwise. A simple letter by ordinary mail would have sufficed. This is an egregious violation of the most basic principle of due process, that no man may be deprived of his property by adjudication unless he has been given notice of the proposed action in order that he has, at least, an opportunity to attend, to be heard, and to defend his rights.

It is especially offensive to principles of due process that Va. Code 8.01-319, as interpreted by the trial court, allows courts to dispense with notice to pro se litigants, thereby giving them less due process than that given to persons who are represented by counsel.

trial court to interpret and apply Va. Code 8.01-319 as justification for the trial court to dispense with all notice to petitioner, allowing respondent to obtain a judgement without any effort to communicate the trial date to her opponent who had appeared in the case and had been actively defending his interests.

The trial court erred further in refusing to set aside the August 1, 1988 award, which was rendered without any notice to him, and, therefore, void. Fundamental fairness and due process require that the judgment be set aside.

CONCLUSION

For the reasons stated above, the petitioner asks that a writ of certiorari to the Supreme Court of Virginia be granted.

Respectfully submitted,

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Court of Appeals of Virginia

FARES SHAMSE EDDINE vs. AMAR BEETAR EDDINE

Record Nos. 0158-89-4, 1558-89-4
12 Va. App. 760, 406 S.E.2d 914
(July 1, 1991)

From the Circuit Court of Fairfax County; Lewis H. Griffith, Judge.

COUNSEL Brian M. McCormack (Dunn, McCormack, MacPherson & Maxfield, on briefs), for appellant.

William E. Findler, for appellee.

JUDGES Judges Bernard G. Barrow, Cole * and Keenan. Opinion by Judge Bernard G. Barrow. Cole, J., dissenting.

FOOTNOTE * Judge Cole participated in the hearing and decision of this case prior to the effective date of his retirement on April 30, 1991 and thereafter by designation pursuant to Code 17-116.01.

AUTHOR: BARROW

OPINION

These domestic relations appeals arise from the denial of a motion to set aside a monetary award and an award of attorney's fees. The husband, against whom the awards were entered, contends that he was denied due process because he did not receive notice of the hearing at which the awards were entered. Prior to the hearing, the trial court had dispensed with notice to the husband because when he moved from Virginia he failed to file a written statement of his new address as required by Code 8.01-319(A). We hold that the husband was not denied due process. In addition, we hold that the trial court did not err, as also contended by the husband, in concluding that it

could not set aside the judgment after the passage of twenty-one days from its entry.

In a final decree of divorce between the parties, entered in 1986, the trial court found that the parties' marital residence was the separate property of the husband. The wife appealed to this court, which found that the residence should have been classified as marital property and, by an order dated March 24, 1988, reversed and remanded the matter for further proceedings.

On March 29, 1988, the husband left the United States for Syria. He shipped his furniture to Syria, closed his medical practice, and stopped making child support payments. He failed, however, to provide the wife or the trial court with his new address. As a result, the wife moved pursuant to Code ^U 8.01-319(A) to dispense with any further notice to him. Notice of the hearing of this motion, scheduled for May 6, 1988, was posted on the door of the marital residence, the husband's last known residence in Virginia. On May 6, 1988, the trial court entered an order granting the wife's motion to dispense with any further notice to the husband.

The husband testified that he returned to Virginia to live in the marital residence on June 24, 1988. The wife acknowledges that after the husband's return, she saw him on the street some six or seven houses away from the marital residence but did not inform the trial court. She also testified that the notice of the hearing for May 6, 1988, was still posted on the door of the home as late as July.

On August 1, 1988, without any notice to the husband, the trial court heard evidence and entered an order awarding the wife a $289,540 monetary award and $3,000 attorney's fees. On August 22, 1988, the husband, pro se, filed a motion to set aside this order on the ground that it was void because he had received no notice of the August 1 hearing. The motion was not heard until August 26, 1988, and on January 6, 1989, the trial court denied the motion because more than twenty-one days had elapsed since the entry of the order. On November 15, 1989, the husband, by counsel, moved to set aside the August 1, 1988 order because it violated his due process rights under the constitutions of the United States and Virginia. The trial

court denied the motion, and the husband has appealed, contending that due process requires that 'notice of trial setting be given litigants' and that 'pro se litigants [not be given] less notice than. other litigants.' n1

The requirements of the due process clause are satisfied if a party 'has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it.' Dohany v. Rogers, 281 U.S. 362, 369 (1930). The 'practicalities and particularities of the case' must be considered in determining whether these requirements are reasonably met. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

An elementary requirement of due process in any proceeding is 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' Id. Such notice 'must afford a reasonable time for those interested to make their appearance.' Id.

Unquestionably, the husband received such notice. He was served with process, made an appearance and had an opportunity to present his objections. The husband appeared and actively participated in the proceeding prior to the entry of a decree of divorce and, thereafter, on appeal. Notice to him was dispensed with only after he absented himself from the jurisdiction of the court without providing the clerk with his new address as required by statute.

Due process does not require actual notice to a party of the date of a trial or hearing after he or she has been properly made a party to the proceeding. See Williamson v. Hopewell Redevelopment & Housing Authority, 203 Va. 653, 655, 125 S.E.2d 849, 850-51 (1962). The legislature may prescribe 'the kind of notice and the manner in which it shall be given if it is reasonable under all the circumstances and affords the party affected a reasonable opportunity to be heard.' Id.

In this case, the General Assembly prescribed the 'kind of notice and the manner in which it... [should] be given.' Since he was a pro se litigant, the husband was required to file with the clerk of the court 'a written statement of his place of

residence and mailing address.' Code 8.01-319(A). n2 He was further required to 'inform the clerk in writing of any changes of residence and mailing address during the pendency of the action.' Id. The wife was entitled to rely on such statement and since the statement was not filed, the court was authorized to dispense with notice to the husband. See id.

Code 8.01-319 imposes different, not 'less,' notice requirements for a pro se litigant than one represented by counsel. A pro se litigant is required to advise the clerk of court of his address and any change in it. If a litigant is not pro se, but is represented by counsel, papers may be served on 'an attorney authorized to practice law in this Commonwealth' who has entered a general appearance for the litigant. Code ^U 8.01-314. Both of these provisions serve to ensure that notice of the proceedings may be served on the litigants. The failure to provide an address sufficient to ensure such notice may prevent a case from proceeding in an orderly manner. See Byrum v. Lowe & Gordon, Ltd., 225 Va. 362, 363-64, 302 S.E.2d 46, 47 (1983). If a litigant wishes to be informed of the proceedings, he or she must either keep the court advised of where service may be accomplished or be represented by counsel upon whom service may be had. The husband's failure to receive notice because he moved from his residence without notifying the clerk of his new address did not deprive him of due process of law. To hold otherwise would allow a litigant disappointed in the direction litigation might be taking to thwart the authority of the court by leaving the area without notifying the court of his or her new address.

Finally, in appealing the trial court's refusal to set aside the judgment, the husband contends that the twenty-one day limitation contained in Rule 1:1 does not bar the trial court from setting aside a void judgment. He contends that this judgment was void because it violated his 'due process right to notice.' As previously discussed, the judgment did not violate the husband's right to due process; therefore, the trial court did not err in concluding that Rule 1:1 prevented it from setting aside the judgment.

For these reasons, the judgment of the trial court entering a monetary award and an award for attorney's fees and

its order denying the husband's motion to set aside the judgment are affirmed.

Affirmed.

DISPOSITION

Affirmed.

DISSENT

COLE

Cole, J., dissenting.

In these consolidated domestic relations cases, we review a monetary award to the wife in the amount of $289,540 plus $3,000 in attorney's fees, an amount in excess of the marital assets. conclude that the husband was denied due process when the trial court dispensed with notice to him in setting the trial date to determine the marital award in accordance with a remand from this court. Therefore, I dissent.

The litigation in this divorce case has been protracted since the separation of the parties in July 1984. A final decree of divorce was entered in this cause in the Circuit Court of Fairfax County on October 27, 1986. The final decree declared that the marital residence was the separate property of the husband. On the day the final decree was entered, the trial court entered an order permitting the husband's counsel to withdraw as attorney of record, leaving the husband pro se in the cause.

The wife appealed the final decree which held that the marital residence was the husband's separate property. We found that the residence should have been classified as marital property, and by an order dated March 24, 1988, reversed and remanded the cause to the trial court for further proceedings.

The primary dispute in this appeal centers around the validity of an order entered in the trial court on May 6, 1988. The basis upon which the order was entered was an affidavit

furnished the court executed on April 28, 1988, by the wife, Amar. It states, in pertinent part:

1. The defendant has removed himself from Fairfax County and from the Commonwealth of Virginia and no longer resides in this area.

2. Upon information and belief, the defendant has moved to Syria with no intention of returning.

In pertinent part, the May 6, 1988, order states:

It appearing to the Court that the defendant is pro se in this matter, and has become a nonresident of Virginia, and it further appearing to the Court that he has not filed a written statement of his place of residence and mailing address with the Clerk of this Court as required by Section 8.01-319 of the Code of Virginia, it is hereby ORDERED that the defendant is entitled to no further notice in this matter.

Armed with the May 6, 1988, order, counsel for the wife filed a praecipe in the clerk's office on May 10, 1988, requesting that this case be placed on the term day docket for May 31, 1988, to be set down for trial without a jury. The praecipe noted that the defendant, Fares Eddine, was not entitled to any notice in the matter. Accordingly, no attempt was made by the clerk to transmit to Fares the usual certificate indicating the trial date. At the term day docket, the cause was set for hearing on August 1, 1988, in Fares' absence.

On August 1, 1988, without any notice to Fares, the trial court heard evidence on the remand from the March 24, 1988, order of this Court. The trial court found that the marital residence was marital property and awarded Amar Eddine a monetary award in the amount of $289,540 plus $3,000 in attorney's fees. The court further held that the award would constitute a lien against the marital residence of the parties at 6513 Lakeview Drive, Falls Church, Virginia.

The record discloses that on March 29, 1988, Fares left this country for Syria. When he left, he closed his medical practice, stopped making child support payments and told his

children that he was leaving for Syria. His children wrote to him in Syria, via Fares' parents. A neighbor, Meri Shoheiber, took Fares to the airport and testified that Fares made no clear statement that he was not coming back; his return was an open possibility. Fares' next door neighbor, Miles Q. Romney, testified that in the early spring of 1988, Fares told him that he intended to go to Damascus, Syria, and Fares gave him an address in Damascus. Romney went through Fares' mail and those things which looked important, and air-mailed them to Fares at his Damascus address. The record further establishes that on June 24, 1988, Fares returned to Fairfax County and resided at the marital residence. The wife became aware that Fares had returned from Syria because, according to her testimony, she saw him six or seven houses down the road from his home. She did not mention that Fares had returned from Syria at the August 1, 1988, hearing because she 'was not asked.'

In early August 1988, Fares inquired of the circuit court the status of his pending suit. At this time, he learned for the first time of the August 1, 1988, order awarding his wife a monetary award of $289,540 plus attorney's fees. Fares, acting pro se, filed on August 22, 1988, a motion to set aside the order on the ground that it was void, having been entered without notice. The order was not vacated and the motion was not heard until August 26, 1988. Although the motion was filed within twenty-one days of the August 1 order, it was not heard until after expiration of the twenty-one day period. On January 6, 1989, the trial court entered an order denying the motion to set aside the August 1, 1988, order 'because more than twenty-one days have elapsed since the entry of the order,' holding in effect that it no longer had jurisdiction over the cause.

Fares retained counsel and on November 15, 1988, counsel filed another motion to set aside the August 1, 1988, order on the basis that it was void because it was violative of Fares' due process rights under both the United States and the Virginia Constitutions. n3 On September 5, 1989, the trial court heard evidence on this motion and on the same day entered an order denying the motion to set aside the August 1, 1988, order.

The two orders of the trial court refusing to set aside the August 1, 1988, order form the basis of this consolidated appeal.

I only address Fares' contention that his due process rights were violated when the court dispensed with all further notice to him in the May 6, 1988, order. Many disputes have arisen concerning the abstract words of the due process clause but 'there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Mullane v. Central Hanover Bank., 339 U.S. 306, 313 (1950). A person must be given notice reasonably calculated, under all the circumstances, to apprise him of the pendency of an action against him and afford him an opportunity to be heard. Id. at 314. Reasonableness under all of the circumstances mandates that 'the means employed must be such as one [who is] desirous of actually informing the absentee might reasonably adopt to accomplish it.' Id. at 315; see Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799-800 (1983).

It is equally essential that a person be given notice of any proposed action during a pending proceeding which affects his or her rights. The United States and Virginia Constitutions require a person to be given notice, but the legislature in its discretion prescribes the kind of notice and the manner in which the notice is given, provided the notice is reasonable under all the circumstances. Doe v. Brown, 203 Va. 508, 512, 125 S.E.2d at 163 (1962); A. S. White & Co. v. Jordan, 124 Va. 465, 468, 98 S.E. 24, 25 (1919); Violett v. City Council of Alexandria, 92 Va. 561, 570, 23 S.E. 909, 912 (1896). 'Where a defendant has received personal service of process, irregularity will not defeat the court's jurisdiction, but if a statute provides for constructive service, the terms of the statute authorizing it must be strictly followed or the service will be invalid and any default judgment based upon it will be void.' Khatchi v. Landmark Restaurant Associates, Inc., 237 Va. 139, 142, 375 S.E.2d 743, 745 (1989).

Further, the Supreme Court of the United States has held that state statutes which provide that service of process

may be made on the Secretary of State in actions by residents against nonresidents for personal injuries resulting from the operation of motor vehicles are unconstitutional unless some provision requires the Secretary of State's office to mail the notice to the defendant, or to advise him, by some written communication. The Court has stated that the law 'should make a reasonable provision for such probable communication.' Wuchter v. Pizzutti, 276 U.S. 13, 19 (1928); accord Carroll v. Hutchinson, 172 Va. 43, 50, 200 S.E. 644, 647 (1939).

Acknowledging that 'due process' requires notice and an opportunity to be heard, Amar argues that Fares had notice that this case was remanded by this Court to the circuit court for further proceedings, that he abandoned the case and all contact with his family and the State of Virginia, and that notice to Fares was impossible when the May 6, 1988, order was entered. She contends that this is precisely the situation contemplated by Code 8.01-319(A) and if it were not for such a provision, she could never have gone forward with the remand hearing.

Fares urges this Court to find Code 8.01-319 unconstitutional since it gives the trial court the discretion to dispense with notice based on the assumption that a party has waived his or her constitutional right to notice by not complying with the statute, including cases when a pro se litigant does not file a written statement of his address.

An analysis of Code 8.01-319(B) is necessary to understand its application to this case. It reads in pertinent part:

> Notwithstanding any provision to the contrary in paragraph A hereof, depositions may be taken, testimony heard and orders and decrees entered without an order of publication, when the defendant has been legally served with or has accepted service of process to commence a suit for divorce or for annulling or affirming a marriage, and he or she or the plaintiff:
>
> 1. Shall thereafter become a nonresident; or

2. Shall remove from the county or city in which the suit is pending, if a resident thereof, or in which he or she resided at the time of the institution of the suit, or was served with process, without having filed with the clerk of the court where the suit is pending a written statement of his or her intended future place of residence, and a like statement of subsequent changes of residence; or

3. When after such written statement has been filed with the clerk, notice shall have been served upon him or her at the last place of residence given in the written statement as provided by law; or

4. Could not be found by the sheriff of the county or city for the service of the notice, and the party sending the service makes affidavit that he has used due diligence to find the adverse party without success. If such absent party has an attorney of record in such suit, notice shall be served on such attorney, as provided by 8.01-314.

I acknowledge that this statute is not easily understood. It does, however, make sense when the four subsections are read together. I believe subsections I and 2 of Code 8.01-319(B) must be read together because these two subsections define the applicable areas that are covered. Subsections 3 and 4 must be read together because these two subsections define the notice requirements. Although the four subsections are separated by the disjunctive 'or,' I do not believe the legislature intended each subsection to be considered separate and apart from the others. If subsection 1 is interpreted without regard to subsections 3 and 4, and if the defendant became a nonresident, depositions could be taken, testimony heard and orders and decrees entered without an order of publication because the subsection does not make any provision for notice, even if the plaintiff knows where the defendant has moved. Subsection 1 makes no provision for the use of due diligence to ascertain the whereabouts of the defendant. If subsection 1 is interpreted in this manner, a clear violation of the due process clause would occur because there is no 'reasonable provision for such

probable communication.' See Wuchter, 276 U.S. at 19.

Subsection 2 provides that when the defendant has been legally served with process to commence a suit for divorce, and either party leaves the county or city in which the suit is pending without having filed with the clerk of the court a written statement of his or her intended future place of residence, or a like statement of subsequent changes of residence, depositions may be taken, testimony heard and orders and decrees entered without an order of publication. By reading subsections 1 and 2 together, I believe the intention of the legislature becomes clear. I would hold that the second part of subsection 2 is applicable to both subsections 1 and 2.

Subsection 2, like subsection 1, does not require notice even if the plaintiff or defendant, as the case may be, knows where the other party has moved. Neither subsection makes provision for the use of due diligence to ascertain the whereabouts of the defendant. In the instant case, the affidavit filed by Amar Eddine did not assert that the whereabouts of Fares was not known to her nor did it state that she had used due diligence to locate him. In the affidavit, she stated that upon information and belief, Dr. Eddine had moved to Syria with no intention of returning. She did not state where she obtained this information. She also did not state that their children wrote to him in Syria and obviously had an address at which he could be contacted. Evidence adduced at the subsequent hearing indicates that his location was easily obtainable.

Code 8.01-319(A) does not require the clerk of court to mail a copy of the notice of any proceeding in the court to the adverse party even if such party has filed the place of his residence and mailing address with the court. The statute only states: 'The clerk and all parties to the action may rely on the last written statement filed as aforesaid.' However, by construing subsections 3 and 4 as applicable to subsections 1 and 2, Code 8.01-319 makes 'reasonable provision for such probable communication.'

Subsection 3 of 8.-01-319(B) gives the clerk an address for a party and notice may be served upon the party at that location. Subsection 3, as I construe the statute, provides that

if 'notice shall have been served upon him or her at the last place of residence given in the written statement,' depositions, testimony, and orders and decrees can be entered without an order of publication. If the party is served, no order of publication is necessary.

In the event a party cannot be served as provided in subsection 3, subsection 4 becomes applicable. This subsection provides that where the sheriff of the county or city attempting to serve the notice (referring to subsection 3) cannot find the party and the 'party sending the service makes affidavit that he has used due diligence to find the adverse party without success,' depositions, testimony, and orders and decrees may be heard without an order of publication. Code 8.01-319(A) provides that the 'court in which the action is pending may dispense with such notice for failure of the party to file the statement herein provided for or may require notice to be given in such manner as the court may determine.' I find that section A of Code 8.01-319 is applicable to section B of the statute. Whether to dispense with the publication is a matter within the sound discretion of the trial judge. However, 'sound reasoning and policy demand that publication in a newspaper should never be dispensed with in two situations, namely, in divorce cases and when it is sought to bring in parties unknown.' See B. Lamb, A Virginia Cause 40 (Rev. ed. 1976). Amar did not comply with Code 8.01-319(B)(4). Affidavits must strictly conform to the statutory requirements. 'If a statute provides for constructive service, the terms of the statute authorizing it must be strictly followed or the service will be invalid and any default judgment based upon it will be void.' Khatchi, 237 Va. at 142, 375 S.E.2d at 745; see also Dennis v. Jones, 240 Va. 12, 18, 393 S.E.2d 390, 393 (1990). Code 8.01-319(B)(4) requires that a sheriff attempt to locate the adverse party and if the sheriff is unsuccessful, the party sending service must allege in an affidavit that he used due diligence to find the adverse party without success. The difference between the affidavit filed in this case and the statutory requirement is significant. First, there is no evidence a sheriff attempted to locate Fares. Second, the affidavit does not assert that Amar used due diligence to find him. In fact, the evidence indicates that Fares' location was

easily ascertainable. While he was in Syria, the Eddine children wrote to him and his mail was being forwarded by a neighbor. When he returned to the marital residence, Amar saw him in the area. Moreover, she failed to disclose to the court that her husband had returned from Syria. I believe that a party who submits an affidavit asserting the truth of a matter has a continuing duty to update the affidavit as new facts come to the party's attention which make the affidavit false or misleading. Because of these facts, Amar did not comply with the statute permitting the trial court to dispense with publication.

I would hold that the order of May 6, 1988, dispensing with further notice in the cause, is void because it was based upon an insufficient affidavit and violated Fares Eddine's due process rights under the fourteenth amendment to the United States Constitution. It follows that the order of August 1, 1989, is void for the same reasons. I would reverse these orders and remand for further proceedings in accordance with our remand order of March 24, 1988. For these reasons, I do not join in the majority opinion.

FOOTNOTES

n1 Notice was dispensed with pursuant to the provisions of Code 8.01-319(A), and the appellant only contests the constitutionality of Code 8.01-319(A). We, therefore, address only the constitutionality of this provision and do not address the applicability of Code 8.01-319(B) discussed in the dissent.

n2 Although the headline of Code 8.01-319 reads 'Publication of interim notice,' we believe that this section is not limited to only those cases initiated by publication. See Code 1-13.9.

n3 The Supreme Court of Virginia has held that the two due process clauses of the federal and state constitutions confer identical rights. Archer v. Mayes, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973); see Leftwich v. Bevilacqua, 635 F. Supp. 238 (W.D. Va. 1986). In this dissent I make no distinction between the two clauses and consider them together.

VIRGINIA: (8/22/91)

IN THE COURT OF APPEALS OF VIRGINIA
ON THURSDAY THE 22D DAY OF AUGUST, 1991

Fares Shamse Eddine
Appellant,

against Record Nos. 0158-89-4 and 1558-89-4
Circuit Court No. CH88844

Amar Beetar Eddine,
Appellee

Upon a Petition for Rehearing En Banc

Before the Full Court

Upon a vote of the full Court, the petition for rehearing en banc, filed by appellant on July 16, 1991, is hereby denied.

A Copy,
Teste:
Patricia G. Davis, Clerk
By: (s)
Deputy Clerk

APPENDIX 14

VIRGINIA: (1/29/92)

IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING
IN THE CITY OF RICHMOND
ON WEDNESDAY THE 29TH DAY OF JANUARY, 1992

Fares Shamse Eddine
Appellant,

against

Record No. 911502
Court of Appeals Nos. 0158-89-4 and 1558-89-4

Amar Beetar Eddine,

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A Copy,
Teste:
David B. Beach, Clerk
By: (s)
Deputy Clerk

VIRGINIA: (5/3/88)

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

AMAR BEETAR EDDINE	:	
Plaintiff	:	
v.	:	Chancery No. 88844
FARES SHAMSE EDDINE	:	
Defendant	:	

NOTICE

Please take notice that on May 6, 1988, at 10:00 a.m., or as soon thereafter as counsel may be heard, counsel for the plaintiff will move this Court for the following relief:

1. To issue a bench warrant for the arrest of the defendant for failure to appear in this Court as ordered on April 15, 1988.

2. To enter an Order providing no further notice need be given to the defendant.

3. To grant the plaintiff a lien for payment of future alimony as previously ordered by this Court.

AMAR BEETAR EDDINE
By counsel

(s)
William E. Findler
Counsel for Plaintiff
1911 N. Fort Myer Drive, Ste. 704
Arlington, Virginia 22209

Serve: Fares Shamse Eddine
6513 Lakeview Drive
Falls Church, Fairfax County, Virginia

VIRGINIA: (4/26/88)

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

AMAR BEETAR EDDINE :
Plaintiff :
v. : Chancery No. 88844
FARES SHAMSE EDDINE :
Defendant :

AFFIDAVIT

AMAR BEETAR EDDINE, after having been duly sworn, deposes and states as follows:

1. The defendant has removed himself from Fairfax County and from the Commonwealth of Virginia and no longer resides in this area.

2. Upon information and belief, the defendant has moved to Syria with no intention of returning.

(s)
AMAR BEETAR EDDINE

STATE OF VIRGINIA
COUNTY OF ARLINGTON, SS:

Subscribed and sworn to before me a Notary Public in and for the State and County aforesaid this 26 day of April, 1988.

(s) NOTARY PUBLIC

My Commission Expires:__

VIRGINIA: (5/6/88)

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

AMAR BEETAR EDDINE	:	
Plaintiff	:	
v.	:	Chancery No. 88844
FARES SHAMSE EDDINE	:	
Defendant	:	

ORDER

This matter came to be heard on the motion of the plaintiff, pursuant to Section 8.01-319 of the Code of Virginia, that the defendant not be entitled to further notice in this matter. It appearing to the Court that the defendant is pro se in this matter, and has become nonresident of Virginia, and it further appearing to the Court that he has not filed a written statement of his place of residence and mailing address with the Clerk of this Court as required by Section 8.01-319 of the Code of Virginia; it is hereby

ORDERED that the defendant is entitled to no further notice in this matter.

Dated this 6th day of May, 1988.

(s) Judge

I ask for this:
(s)
William E. Findler
Counsel for Plaintiff
1911 N. Fort Myer Drive, Ste. 704
Arlington, Virginia 22209

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

AMAR BEETAR EDDINE Plaintiff	:	
v.	:	Chancery No. 88844
FARES SHAMSE EDDINE Defendant	:	

PRAECIPE

The Clerk of this Court will please put the above-styled case on the Term Day Docket for May 31, 1988, at 10:00 a.m. to be set down for trial without a jury. Please note that by Order of the Court dated May 6, 1988 the defendant is not entitled to further notice in this matter.

AMAR BEETAR EDDINE
By counsel

(s)
William E. Findler
Counsel for Plaintiff
1911 N. Fort Myer Drive, Ste. 704
Arlington, Virginia 22209

VIRGINIA: (8/1/88)

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

AMAR BEETAR EDDINE	:	
Plaintiff	:	
v.	:	Chancery No. 88844
FARES SHAMSE EDDINE	:	
Defendant	:	

ORDER

This matter came to be heard upon the motion of the plaintiff for an equitable distribution award following the decision of the Court of Appeals of Virginia dated March 24, 1988.

Upon consideration of the evidence presented in this case and the argument of counsel, and upon the consideration by the Court of the factors set forth in Section 20-107.3(E); it is hereby

ORDERED that the marital residence is marital property;

RDERED that the plaintiff is awarded a lump sum distribution in the amount of $289,450; and it is further

ORDERED that the plaintiff is awarded attorney's fees in the amount of $3000; and it is further

ORDERED that the Clerk of the Court enter a lien against the defendant Fares Shamse Eddine upon the real estate located at 6513 Lakeview Drive, Falls Church, Virginia (being Lot 356 Section 3, Lake Barcroft) for the amounts adjudged.

Dated this 1st day of August, 1988.

(s) Judge

I ask for this:
(s) William E. Findler
Counsel for Plaintiff
1911 N. Fort Myer Drive, Ste. 704
Arlington, Virginia 22209

VIRGINIA: (8/18/88)

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

AMAR BEETAR EDDINE	:	
Plaintiff	:	
v.	:	Chancery No. 88844
FARES SHAMSE EDDINE	:	
Defendant	:	

NOTICE AND MOTION

To: AMAR BEETAR EDDINE
c/o William E. Findler, Esquire
2111 Wilson Boulevard, Suite 550
Arlington, Virginia 22201

PLEASE TAKE NOTICE that on the 22nd day of August, 1988, at 10:00 a.m. or as soon thereafter as I may be heard, I will move the Court to set aside the orders entered herein on August 1, 1988, on the grounds that they are void, having been entered without notice to me.

(s) FARES SHAMSE EDDINE

CERTIFICATE

I HEREBY CERTIFY that I hand delivered a copy of the foregoing NOTICE AND MOTION to the office of William E. Findler, Esquire, Counsel for Plaintiff, this 18th day of August, 1988.

(s) FARES SHAMSE EDDINE

VIRGINIA: (9/5/88)

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

AMAR BEETAR EDDINE Plaintiff	:	
v.	:	Chancery No. 88844
FARES SHAMSE EDDINE Defendant	:	

ORDER

This matter came to be heard on the motion of the defendant to set aside the judgments entered on August 1, 1988, as being void and violative of the defendant's due process rights under the Constitutions of the United States of America and the Commonwealth of Virginia and was argued by counsel. It appearing to the Court that the motion should be denied; it is hereby

ORDERED that the defendant's motion is denied.

Dated this 5th day of September, 1988.

(s) Judge

I ASK FOR THIS:
(s) William E. Findler
Counsel for Plaintiff
2111 Wilson Blvd, Ste 550
Arlington, Virginia 22209

SEEN AND OBJECTED TO:
(s) Brian M. McCormack
Counsel for Defendant
3925 University Drive
Fairfax, Virginia 22030

V I R G I N I A: (11/15/88)

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

AMAR BEETAR EDDINE
Plaintiff

v. CHANCERY NO. 88844

FARES SHAMSE EDDINE
Defendant

MOTION

To: AMAR BEETAR EDDINE
c/o William E. Findler, Esquire
2111 Wilson Boulevard, Suite 550
Arlington, Virginia 22201

COMES NOW the Defendant, by counsel, and moves this Honorable Court to set aside its judgments entered on August 1, 1988, said judgments being void and violative of the Defendant's due process rights under the Constitutions of the United States of America and the Commonwealth of Virginia.

FARES SHAMSE EDDINE
By Counsel

DUNN, McCORMACK, MacPHERSON & MAXFIELD
3925 University Drive
Fairfax, Virginia 22030
(s) Brian M. McCormack
Counsel for Defendant

CERTIFICATE

I hereby certify that I mailed a copy of the foregoing pleading to William E. Findler, Counsel for Complainant this 15 day of November, 1988.

(s) Brian M. McCormack

VIRGINIA: (1/6/89)

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

AMAR BEETAR EDDINE Plaintiff	:	
v.	:	Chancery No. 88844
FARES SHAMSE EDDINE Defendant	:	

ORDER

This matter came to be heard on August 26, 1988, upon the motion of the defendant to set aside the judgments entered on August 1, 19888, on the grounds that they are void, having been entered without notice to the defendant, and was argued. It appearing to the Court that the motion should be denied; it is hereby

ORDERED that the defendant's motion is denied.

Dated this 6th day of January, 1989.

(s) Judge

I ASK FOR THIS:
(s) William E. Findler
Counsel for Plaintiff
2111 Wilson Blvd, Ste 550
Arlington, Virginia 22209

SEEN AND OBJECTED TO:
(s) Brian M. McCormack
F. S. Eddine, Defendant
by: counsel
Brian M. McCormack

8.01-319. Publication of interim notice.

A. In any case in which a nonresident party or party originally served by publication has been served as provided by law, and notice of further proceedings in the case is required but no method of service thereof is prescribed either by statute or by order or rule of court, such notice may be served by publication thereof once each week for two successive weeks in a newspaper published or circulated in the city or county in which the original proceedings are pending. If the original proceedings were instituted by order of publication, then the publication of such notice of additional or further proceedings shall be made in the same newspaper. A party, who appears pro se in an action, shall file with the clerk of the court in which the action is pending a written statement of his place of residence and mailing address, and shall inform the clerk in writing of any changes of residence and mailing address during the pendency of the action. The clerk and all parties to the action may rely on the last written statement filed as aforesaid. The court in which the action is pending may dispense with such notice for failure of the party to file the statement herein provided for or may require notice to be given in such manner as the court may determine.

B. Notwithstanding any provision to the contrary in paragraph A hereof, depositions may be taken, testimony heard and orders and decrees entered without an order of publication, when the defendant has been legally served with or has accepted service of process to commence a suit for divorce or for annulling or affirming a marriage, and he or she or the plaintiff:

1. Shall thereafter become a nonresident; or

2. Shall remove from the county or city in which the suit is pending, if a resident thereof, or in which he or she resided at the time of the institution of the suit, or was served with process, without having filed with the clerk of the court where the suit is pending a written statement of his or her intended

future place of residence, and a like statement of subsequent changes of residence; or

3. When after such written statement has been filed with the clerk, notice shall have been served upon him or her at the last place of residence given in the written statement as provided by law; or

4. Could not be found by the sheriff of the county or city for the service of the notice, and the party sending the service makes affidavit that he has used due diligence to find the adverse party without success. If such absent party has an attorney of record in such suit, notice shall be served on such attorney, as provided by 8.01-314.

C. This section shall not apply to orders of publication in condemnation actions.

(Code 1950, ^U 8-76; 1950, p. 68; 1954, c. 333; 1960, c. 16; 1970, cc. 241, 279; 1977, c. 617; 1978, c. 676; 1979, c. 464; 1982, c. 384.)